84-743

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1984

BETTY A. ROSEN,

Petitioner,

vs.

CHRYSLER PLASTIC PRODUCTS CORP., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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SUBJECT INDEX

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Petitioner, Betty A. Rosen, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on August 8, 1984.

QUESTIONS PRESENTED

1. Whether the payment of "red-circle rates" to a male employee for a period of nearly a decade, coupled with the fact that such "red-circling" may and, in all likelihood, will continue until the male employee's work life ends, constitutes a permissible justification under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., for paying and continuing to pay a female employee performing substantially equal work in the same department a lesser wage.

2. Whether "red-circle rates", which serve no remedial purpose, foster a result in conflict with Title VII or the Equal Pay Act, or result in a permanent perpetuation of unequal wages for equal work, are legally permissible.

TABLE OF AUTHORITIES

Cases

Statutes

Federal Statutes:

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio, Western Division, has not been reported and is printed as Appendix A hereto. The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported and is printed as Appendix B hereto.

JURISDICTION

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the case of Betty A. Rosen v. Chrysler Plastic Products Corporation and United Auto Workers Local 1879, Case No. 83-3273, entered August 8, 1984. That judgment affirmed the judgment of the United States District Court for the Northern District of Ohio,

Western Division, entered March 28, 1983, denying petitioner's motion for summary judgment and granting respondents' motions for summary judgment. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. Section 206(d)(1)-(2):

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential

based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

42 U.S.C. Section 2000e-2(a)(1):

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. Section 2000e-2(c)(3):

(c) It shall be an unlawful employment practice for a labor organization--

* * *

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. Section 2000e-2(h):

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the

basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

29 C.F.R. Section 800.146-.147:

§800.146 Examples--"red circle" rates, in general.

The term "red circle" rates describes certain unusual, higher than normal, wage rates which are maintained for many reasons. An example of the use of a "red circle" rate might arise in a situation where a company wishes to transfer a long service male employee, who can no longer perform his regular job because of ill health, to different work which is now being performed by women. Under the "red circle" principle the employer may continue to pay the male employee his present salary, which is greater than that paid to the women employees for the work both will be doing. Under such circumstances, maintaining an employee's established wage rate, despite a reassignment to a less demanding job is a valid reason for the differential even though other employees performing the less demanding work would be paid at a lower rate, since the differential is

based on a factor other than sex. However, where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work, rates of the higher paid employees may not be "red circled" in order to comply with the Act. To allow this would only continue the inequities which the Act was intended to cure.

§800.147 Examples--temporary reassignments.

For a variety of reasons an employer may require an employee, for a short period, to perform the work of a job classification other than the employee's regular classification. If the employee's rate for his regular job is higher than the rate usually paid for the work to which he is temporarily reassigned, the employer may continue to pay him the higher rate, under the "red circle" principle. For instance, an employer who must reduce help in a skilled job may transfer employees to less demanding work without reducing their pay, in order to have them available when they are again needed for their former jobs. Although employees traditionally engaged in performing the less demanding work would be paid at a lower rate than those employees

transferred from the more skilled jobs; the resultant wage differential would not constitute a violation of the equal pay provisions since the differential is based on factors other than sex. This would be true during the period of time for which the "red circle" rate is bona fide. (See §800.146) Temporary reassignments may also involve the opposite relationship of wage rates. Thus, an employee may be required, during the period of temporary reassignment, to perform work for which employees of the opposite sex are paid a higher wage rate than that paid for the duties of the employee's regular job classification. In such a situation, the employer may continue to pay the reassigned employee at the lower rate, if the rate is not based on quality or quantity of production, and if the reassignment is in fact a temporary one. If a piece rate is paid employees of the opposite sex who perform the work to which the employee in question is reassigned, failure to pay that employee the same piece rate paid such other employees would raise questions of discrimination based on sex. Also, failure to pay the higher rate to the reassigned employee after it becomes known that the reassignment will not be of a temporary nature would raise a

> question whether sex rather than the temporary nature of the assignment is the real basis for the wage differential. Generally, failure to pay the higher rate for a period longer than one month will raise questions as to whether the reassignment was in fact intended to be a temporary one.

STATEMENT OF THE CASE

Petitioner, Betty A. Rosen, and her male counterpart, Gary A. Dunn, have been employed by Chrysler since 1968, at which time Rosen earned more than Dunn. Between early 1971 and late 1972, while Rosen's wage remained unchanged, Dunn was given a series of "progression" increases. By May, 1973, Dunn was earning 10% more than Rosen in a grade 9 classification as opposed to Rosen's grade 7.

Since 1973, although Rosen has consistently been paid less than Dunn, Rosen and Dunn have performed virtually

identical work involving equal skill, effort, and responsibility. In 1977, Dunn and Rosen were placed in a grade 8 classification yet Dunn continues, despite the fact he performs work identical to Rosen, to earn a grade 9 wage. This result has been accomplished, over Rosen's objections, through Union/Chrysler agreements, beginning in 1974, to permanently "red-circle" the wage differential between Rosen and Dunn. Between 1973 and June, 1982, Dunn earned $7,586.84 more than Rosen. He will continue to earn more than Rosen so long as he holds his job.

Following the filing of an EEOC charge and the issuance of a probable cause determination in her favor and a right-to-sue letter, Rosen timely filed her Title VII claim in district court. On March 28, 1983, the court held the

"red-circle" rate paid to Dunn permissible under 29 U.S.C. Section 206(d)(1)(iv) and granted defendants summary judgment. On August 8, 1984, the United States Court of Appeals for the Sixth Circuit affirmed the district court's opinion.

BASIS FOR FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance was based on 28 U.S.C. Section 1331 and 42 U.S.C. Section 2000e-5.

ARGUMENT

42 U.S.C. §2000e-2(a)(1) prohibits an employer from discriminating against any individual with respect to compensation because of such individual's sex. 42 U.S.C. §2000e-2(c)(3) prohibits labor organizations from causing or attempting

to cause an employer to discriminate against an individual in violation of §2000e-2.

Title VII incorporates the defenses available under the Fair Labor Standards Act, as amended, 29 U.S.C. §206(d), commonly known as the Equal Pay Act of 1963. Defendants asserted in the courts below that the wage differential between Rosen and Dunn was, is, and will be permissible under 42 U.S.C. §2000e-2(h) and 29 U.S.C. §206(d)(1) since it is based on a "factor other than sex". Defendants had the burden of proof on this issue. Corning Glassworks v. Brennan, 417 U.S. 188, 196-197, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974); cf. 29 C.F.R. §800.141. Defendants alleged the pay disparity between Rosen and Dunn was permissible because Dunn's wage rate had been "red-circled".

The "red-circling" concept is one of first impression for this Honorable Court and, in light of the opinions rendered by the courts below, a concept sorely in need of judicial interpretation and guidance.

A "red-circle" wage rate has been generally defined as:

> * * * a higher rate paid to a particular employee when he is transferred to a job at a lower skill or rate of pay than his former job, either on a temporary basis, to keep him available when he is again needed in his regular, higher paid job, or to avoid hardship when an employee who has served long and faithfully has, by reason of age or illness, become unable longer to perform his regular job." (Emphasis added.) Hodgson v. Goodyear Tire and Rubber Co., 358 F.Supp. 198 (N.D. Ohio W.D. 1973); see 29 C.F.R. §§800.146-.147 and Pettway v. American Pipe Co., 576 F.2d 1157 (5th Cir. 1978).

The Fifth Circuit Court of Appeals has deemed "red-circling" a Title VII

remedial device, utilized when the transfer of discriminatees to jobs located in lines of progression in a new department previously closed to them would involve a temporary sacrifice in wages. The Fifth Circuit has permitted "red-circling" until the discriminatee has the opportunity to progress to the new job he or she would have held but for the past discrimination. At that point, the "red-circling" ends. Watkins v. Scott Paper Co., 530 F.2d 1173 (5th Cir. 1976), cert. denied 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139; Swint v. Pullman Standard, 539 F.2d 77 (5th Cir. 1976); Stevenson v. International Paper Co., 516 F.2d 103 (5th Cir. 1975). For a typical "red-circling" order, see United States v. Inspiration Consolidated Copper Co., 6 CCH E.P.D. para. 8918 (D. Ariz. 1973). Accord, United States v. Bethlehem Steel

Corp., 446 F.2d 652 (2nd Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655; Clark v. American Marine Corp., 304 F.Supp. 603 (D. La. 1969); United States v. United Papermakers & Paperworkers, etc., 301 F.Supp. 906 (D. La. 1969), affirmed 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100; United States v. Lee Way Motor Freight, Inc., 7 CCH E.P.D. para. 9066, 9067 (D. Okla. 1973).

In this case, it is undisputed that the "red-circling" of Dunn's wage was and is not temporary and that he was not "red-circled" because age or illness prevented him from doing his regular job. Dunn, in fact, continues to perform the same job--a job equal to Rosen's--he did before he was "red-circled". The "red-

circling" of his job has persisted for over a decade and, according to defendants, will continue until Dunn retires.

Defendants argued below that the failure to "red-circle" Dunn's wage rate might have a negative effect on him. Defendants and the lower courts neglected to consider the devastating impact of such a discriminatory practice on Betty Rosen, who, for over 10 years, has performed equal work side-by-side a male, whom she trained, who, throughout that 10 year period, earned more than she did. As a result of the decisions of the courts below, Betty Rosen is a woman faced with the certainty she will continue to receive a wage inferior to Dunn's until he retires. The "red-circling" of Dunn's wage rate amounts to the permanent payment of an unequal wage for equal work.

The scope of the "red-circling" defense in Title VII and Equal Pay Act cases is sorely in need of definition. The purpose and limits of "red-circling" need clarification to prevent a misapplication of the concept so severe as to cause a permanent perpetuation of prior discrimination in the payment of wages. "Red-circling" should not be permitted when it serves no remedial purpose, when it fosters a result in conflict with Title VII or the Equal Pay Act, or when its result is a permanent perpetuation of unequal wages for equal work.

This case presents this Honorable Court with its first opportunity to consider the "red-circling" concept, to address and approve the proper uses of "red-circling", and to denounce and reject those circumstances under which this normally laudable, remedial concept

can be perverted so as to perpetuate the payment of unequal wages for equal work and to frustrate the goals of Title VII and the Equal Pay Act. The many thousands of employees who are the victims of improper and illegal "red-circling" anxiously await a pronouncement from this Honorable Court in the unsettled area of the law.

For these reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

Opinion and Order of the District Court

(Filed March 28, 1983)

Case No. C79-93

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Ohio
Western Division

BETTY A. ROSEN,

Plaintiff,

vs.

CHRYSLER PLASTIC PRODUCTS CORP., et al.,

Defendants.

OPINION AND ORDER

POTTER, J.:

This cause came to be heard on cross-motions for summary judgment by the plaintiff and defendant Chrysler Plastic Products Corporation (hereafter Chrysler) and defendant United Automobile, Aerospace and Agricultural Implement Workers

of America, UAW, Local 1879 (hereafter Union). This cause was submitted to the Court on the pleadings, memoranda, affidavits, depositions, answers to interrogatories and oral arguments of counsel.

The plaintiff, Betty A. Rosen, filed the present action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq. She alleges that the defendants, Chrysler and Union, discriminated against her on the basis of sex by consenting to the payment of, and actually paying, greater wages to a male Chrysler employee and Union member, from 1973 through the present, although she performed substantially equal work in the same department, the performance of which involved equal or greater skill, effort and responsibility. The plaintiff seeks back pay equal to that earned by her male counterpart, wage

equalization with the male, reasonable attorney fees and costs.

The following relevant facts are undisputed. The plaintiff is, and at all times relevant was, an employee of the Chrysler Plastic Products Corporation at the Sandusky, Ohio plant. She was originally hired to work at the plant in September, 1965 as a color matcher in the Production Department when it was owned by Airco Company. Shortly after Chrysler's acquisition in 1968, the plaintiff was transferred to the Styling Department. By late 1972, she had the grade 7 job classification of Technician-Test and Analysis.

Gary B. Dunn joined Chrysler's predecessor in 1966 and transferred into the Styling Department in 1967. By late 1972, Dunn was a grade 9 Illustrator-Graphics.

In 1973, the first year for which the plaintiff is attempting to assert a claim for wages, the plaintiff was in the classification of Technician-Test and Analysis at grade 7, and Mr. Dunn was in the classification of Illustrator-Graphic B at grade 9.

On January 2, 1974, the National Labor Relations Board issued a "certification of representative" for a salaried collective bargaining unit of certain salaried employees at the Sandusky plant. The plaintiff and Mr. Dunn were, and are, employees within that unit and the defendant Union became, and is, their collective bargaining agent. During 1974, collective bargaining negotiations began for the first collective bargaining agreement between the Union and Chrysler. During the negotiations it was agreed that any employee, whether male or

female, who was determined to be receiving an improperly high rate of pay as a result of misclassification should be "red-circled" so that such an employee, whether male or female, would not take a pay reduction. Thirteen employees, ten male and three female, were "red-circled."

Later in 1974, the first collective bargaining agreement between the Union and Chrysler was negotiated. The agreement was dated December 9, 1974 and its approximate three-year term, subject to its other provisions, extended until November 23, 1977. Under the 1974-1977 agreement, the pay was basically determined by classification, grade and corresponding salary range. Under these provisions of the agreement, variances between salaries of employees performing the same work were possible because each

classification had a substantial salary range through which an employee may advance by automatic progression increases as well as by performance increases.

The 1974-1977 agreement contained a provision relevant to transfers which provided, in part:

> An employee transferred within a plant or office in the same bargaining unit will be transferred in accordance with the following provisions:
>
> * * *
>
> (3) To a lower grade. An employee transferred from one grade to a lower grade will be transferred:
>
> a. At the same salary if his current salary is one of the automatic progression steps, is between progression steps of the lower grade, or falls within the merit range of the lower grade.
>
> b. To the maximum salary of the lower if his current salary exceeds the maximum.
>
> c. An employee who is transferred to a higher grade than any grade previously held and who within six (6) months of such transfer is transferred again to the grade from which

> he was promoted due to the employee's inability to satisfactorily perform the work of the higher grade shall, upon transfer to such lower grade, receive the same salary he received in the lower grade immediately prior to his promotion. If the employee is eligible for additional progression increases, upon transfer to the lower grade, the time spent in the higher grade will be credited toward completion of the required credited time in the lower grade.
>
> If a transfer from a higher grade to a lower grade is made, a new progression period begins effective with date of transfer. However, when an employee is transferred to a higher grade and subsequently transferred to his former grade, except as provided in 3(c) of this section, he shall receive a salary determined in accordance with Paragraphs 3(a) or (b) of this section, or shall return to the position in the salary range he would have otherwise attained through automatic progression had he not been transferred, whichever results in a higher salary.

During the first month under the collective bargaining agreement, the plaintiff, classified as a Technician-

Test and Analysis at grade 7, received $208.35 per week. Gary Dunn, "red-circled" at the wage rate for Illustrator-Graphic B, grade 9, received $224.26 per week. Thereafter, both the plaintiff and Mr. Dunn received general increases in the same dollar amount and merit increases pursuant to the collective bargaining agreement.

In 1977, the second collective bargaining agreement between the Union and Chrysler was negotiated. It was dated December 8, 1977, and its approximate three-year term, subject to its other provisions, extended until November 23, 1980. Under the 1977-1980 agreement, the pay of an employee was again basically determined by classification, grade, and corresponding salary range. This agreement also contained provisions to protect both male employees and female employees

from wage reductions in situations such as that presented here.

On December 19, 1977, and also as a result of the 1977 negotiations, the plaintiff was changed from the classification of Technician-Test and Analysis at grade 7 to the new classification of Color Specialist-Styling at grade 8, and Mr. Dunn was changed from the classification of Illustrator-Graphic B at grade 9 to the new classification of Color Specialist-Styling at grade 8, which were the same classification and grade as the plaintiff's were. At the time, the plaintiff's rate was increased from $266.90 to $273.95 and Mr. Dunn's rate remained at $290.83. Thereafter, both the plaintiff and Mr. Dunn received general wage increases and cost of living in the same dollar amount pursuant to the collective bargaining agreement.

In 1980, the third collective bargaining agreement between the Union and Chrysler was negotiated. It was dated October 16, 1980, and its approximate three-year term, subject to its other provisions, extends until November 23, 1983. Under the 1980-1983 agreement, the pay of an employee was again basically determined by classification, grade and corresponding salary range. This agreement also contained provisions to protect both male employees and female employees from wage reductions in situations such as that presented here.

In this action, the plaintiff seeks the wage differential between her and Mr. Dunn from 1973 through the present time.

The defendants have opposed the plaintiff's motion for summary judgment, asserting that there is a question of

fact as to whether the plaintiff and Mr. Dunn performed equal work within the permissible time period under Title VII. At oral argument, the plaintiff conceded that this is a question of fact which precludes granting her motion for summary judgment but requested that the Court consider her motion as one for partial summary judgment as to the issue of whether the "red-circling" in this instance is based on sex or is sexually discriminatory in impact.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

42 U.S.C. §2000e-2(a). The last sentence of Section 703(h) of Title VII, known as the Bennett Amendment, further provides as follows:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

42 U.S.C. §2000e-2(h). The Supreme Court has held that the Bennett Amendment incorporates the four affirmative defenses of the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1)(i)-(iv), into Title VII for sex-based wage discrimination claims. County of Washington v. Gunther, 452 U.S. 161 (1981).

The Equal Pay Act of 1963, 29 U.S.C. §§206 et seq., provides, in part, as follows:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of the subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. §206(d)(1).

In opposition to the plaintiff's motion for summary judgment and in support of their motions for summary

judgment, the defendants assert that the wage differential between the plaintiff and Mr. Dunn was made pursuant to a "factor other than sex" which is permissible under 29 U.S.C. §206(d)(1).

For the limited purpose of their motions for summary judgment, the defendants assume that the jobs performed by the plaintiff and Gary Dunn from 1973 to the present were equal within the meaning of Title VII of the Civil Rights Act of 1964.

It is uncontested that the plaintiff was paid less than Mr. Dunn from 1973 through the present time. Affidavit of Chester R. Ferguson, p. 4. The defendants have the burden of proving that the disparity in pay was based on some factor other than sex. Corning Glassworks v. Brennan, 417 U.S. 188, 196-197; Odomes v.

Nucare, Inc., 653 F.2d 246, 251 (6th Cir. 1981).

The defendants assert that initial variances in wages paid the plaintiff and Mr. Dunn were the result of a factor other than sex, and therefore the "red-circling" agreement perpetuated no prior unlawful bias. The congressional history supports "red-circling" as a valid defense:

> Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates."

> This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

H.R. No. 309, 88th Cong., 1st Sess. 3, reprinted in [1963] U.S. Code Cong. & Admin. News, 687, 689.

The United States Department of Labor, in interpreting the phrase "factor other than sex" has approved the principle of "red-circling" as follows:

> The term "red-circle" rates describes certain unusual, higher than normal, wage rates which are maintained for many reasons. An example of the use of a "red-circle" rate might arise in a situation where a company wishes to transfer a long-service male employee, who can no longer perform his regular job because of ill health, to different work which is now

> being performed by women. Under the "red-circle" principle the employer may continue to pay the male employee his present salary, which is greater than that paid to the women employees for the work both will be doing. Under such circumstances, maintaining an employee's established wage rate, despite a reassignment to a less demanding job is a valid reason for the differential even though other employees performing the less demanding work would be paid at a lower rate, since the differential is based on a factor other than sex. However, where wage rate differentials have been or are being paid on the basis of sex to employees performing equal work, rates of the higher paid employees may not be "red-circled" in order to comply with the Act. To allow this would only continue the inequities which the Act was intended to cure.

29 C.F.R. §800.146 (1982), and:

> For a variety of reasons an employer may require an employee, for a short period, to perform the work of a job classification other than the employee's regular classification. If the employee's rate for his regular job is higher than the rate usually paid for the work to which he is

> temporarily reassigned, the employer may continue to pay him the higher rate, under the "red-circle" principle. For instance, an employer who must reduce help in a skilled job may transfer employees to less demanding work without reducing their pay, in order to have them available when they are again needed for their former jobs. Although employees traditionally engaged in performing the less demanding work would be paid at a lower rate than those employees transferred from the more skilled jobs; the resultant wage differential would not constitute a violation of the equal pay provisions since the differential is based on factors other than sex. This would be true during the period of time for which the "red-circle" rate is bona fide.

29 C.F.R. §800.147 (1982).

The principle of "red circling" has also been recognized by the courts as a permissible factor other than sex. In Mangiapane v. Adams, 20 F.E.P. Cases 699 (D.D.C. 1979), on facts similar to those in the present action, the court held that "red-circling" was a factor other

than sex within the meaning of the Equal Pay Act. In Mangiapane a review of various civil service classifications disclosed that the position in dispute could not be sustained at its former grade level. The civil service employer redesignated the position to a lower grade but retained the eleven persons holding the position, nine men and two women, at their former grade level to lessen the adverse impact on those individuals. The court upheld the employer's decision against a challenge by a female employee assigned to the position in dispute. The court held that "the decision . . . to perpetuate the salary differential . . . was not based upon considerations of sex. The agency merely sought to mitigate the impact of a potentially demoralizing adjustment in job classifications. Nor was the decision sexually discriminatory

in its impact." Mangiapane, supra, at 701.

In Marshall v. Hudson Co., 23 W.H. Cases 1327 (E.D. Mich. 1979) the court states: "The 'red circle' principle operates to permit, in extraordinary instances and on an ad hoc basis, the maintaining of disparate wage-rates with respect to workers of different sexes performing essentially equal work, notwithstanding the proscriptions contained in the Act." Id. at 1332.

The initial question to be determined in the present action is whether the disparate wage rate at the time Mr. Dunn was "red-circled" resulted from a sexual bias or from factors other than sex. The evidence submitted in this case is clear that Mr. Dunn and the plaintiff were performing different duties at least until 1974 or 1975.

In her deposition Mrs. Rosen stated that she and Mr. Dunn were doing different work until 1974 or 1975. Rosen deposition, 29-30. She stated that when she first went into the styling department she did color matching, Mr. Dunn did work on the drawing board, and that he continued doing work on the drawing board until 1974 or 1975. Id. at 29-30.

In his deposition, Gary Dunn stated that he joined the styling department at Airco in 1967. Dunn Deposition, 5-6. He stated that in 1968, when Chrysler took over the Airco plant, he was "on the board":

> It was my job to create graphic designs, geometric designs that we could use on vinyl. It was also my job to make signs in the plant, to help with setting up designing displays for the styling department. In that time I think I probably made around 400 designs for the plant.

Q. In what time now are you referring to, from '68 to the present time?

A. No, from '68 to, let's see--actually it went back to '67 when I went in before Chrysler took it over. When Chrysler bought the designs that were already made, more or less, some of them they didn't use. Okay, this goes up to '71 and the actual design was taken out of that job.

Q. What did you do from '71 on?

A. Okay, from '71 on, I got mixed up in a whole bunch of things that this new boss, Neil Brown, brought in with him. He wanted to buy the designs from other people, customers more or less or suppliers from different engraving houses, whatever. An so I did at that time a partial designer's work; I did the designs, I laid out some overlays for silkscreens; I did touch-up work on positive or negative, since we have a photographic facility there; and then I also helped the man that was in charge of all the silkscreening, that was Mr. Bill Matt. And I did color development work too.

Dunn deposition, 7-8.

Dieter Hoyer, product design supervisor at Chrysler, testified that the duties of the plaintiff and Mr. Dunn were different in 1975 and were different until 1981. Hoyer deposition, 14-17.

The defendants have admitted, for purposes of their motions for summary judgment only, that the plaintiff and Mr. Dunn have performed the same duties from 1973 to the present.

The Court finds that the wage differential between the plaintiff and Mr. Dunn as of May, 1973, was due to a factor other than sex. It is undisputed that until sometime in 1971 Mr. Dunn worked on the drawing board, a task that the plaintiff never performed. It is also undisputed that at least until May, 1973, Mr. Dunn performed some work on the drawing board, as well as other tasks, which the plaintiff did not do. Because

Mr. Dunn performed these tasks he was classified in a job title which put him in a higher salary grade than the plaintiff. Therefore, as of May, 1973, Mr. Dunn's salary was higher than the plaintiff's due to factors other than sex.

In 1974 the Union was certified for the first time as the collective bargaining representative for Chrysler employees in the office, clerical and technical areas. During the course of negotiations for the first contract between the parties, it was discovered that certain employees, both male and female, held classifications and accompanying pay grades which did not reflect the actual job duties of these individuals at that time (Chrysler answers to second set of interrogatories, answer 4, pp. 3-4). To rectify this situation, Chrysler and the

Union agreed to "red-circle" the individuals, both male and female, in that situation, so long as they remained on the job with the understanding that if they left the job, their replacements would be assigned the appropriate classification and salary grade (Id., No. 4, pp. 3-4). Ten men and three women were "red-circled" pursuant to this agreement. The "red-circling" agreement and the other provisions of the proposed collective bargaining agreement were explained to the employees at a ratification meeting and the agreements were thereafter ratified. Watkins' Affidavit, Ferguson Affidavit, p. 5.

The Court finds that the "red-circle" provision in this case is a valid sex-neutral resolution of the pay disparity which Chrysler and the Union faced when they negotiated the collective

bargaining agreement. The plaintiff's reliance on Hodgson v. Goodyear Tire and Rubber Co., 358 F.Supp. 198 (N.D. Ohio 1973), is misplaced. In that case the checkers were classified based on sex in accordance with Ohio statutes then in effect. The court in Hodgson disallowed continuation of the pay disparity after the jobs became equal because the original disparity had been based on sex. In this case, the original pay disparity was not based on sex.

During the first month of the 1974-1977 collective bargaining agreement, the plaintiff, classified as a Tech-Test & Analysis, Salary Grade 7, received $208.35 per week. Mr. Dunn, "red-circled" at the wage rate for Illustrator-Graphic B, Salary Grade 9, received $224.26 per week. Thereafter, both the plaintiff and Mr. Dunn received general

increases in the same dollar amount and merit increases pursuant to the sex-neutral provisions of the collective bargaining agreement. Exhibit A to Chrysler's answer to plaintiff's first set of interrogatories.

During the negotiations for the 1977 collective bargaining agreement, Mr. Dunn, who was then Union President, agreed to a change in classification to the lower grade, Color Specialist-Styling, Salary Grade 8. The plaintiff was promoted to the same classification and grade. Because of this promotion, the plaintiff received a 3% wage increase to $273.95. Due to the sex-neutral lower grade provisions of the collective bargaining agreement, Mr. Dunn retained his old wage rate of $290.83. Thereafter both the plaintiff and Mr. Dunn received general wage increases and cost of living

in the same dollar amount pursuant to the collective bargaining agreement. Chrysler's answers to plaintiff's first and second set of interrogatories.

Therefore, the Court finds that at all times relevant the difference in wages between the plaintiff and Mr. Dunn was due to factors other than sex. Accordingly, the plaintiff's motion for summary judgment will be denied and the defendants' motions for summary judgment will be granted.

THEREFORE, for the above stated reasons, good cause appearing, it is

ORDERED that the plaintiff's motion for summary judgment should be, and hereby is, DENIED; and it is

FURTHER ORDERED that the Union's motion for summary judgment should be, and hereby is, GRANTED; and it is

FURTHER ORDERED that Chrysler's motion for summary judgment should be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the plaintiff's complaint should be, and hereby is, DISMISSED.

/s/ JOHN W. POTTER

United States District Judge

APPENDIX B

Opinion and Order of the Court of Appeals

(Decided and Filed August 8, 1984)

No. 83-3273

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

BETTY A. ROSEN,

Plaintiff-Appellant,

vs.

CHRYSLER PLASTIC PRODUCTS CORP., et al.,

Defendants-Appellees.

Appeal from United States District Court
for the Northern District of Ohio.

Before: KEITH and MARTIN, Circuit Judge, and SWYGERT*.

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*Honorable Luther M. Swygert, United States Court of Appeals for the Seventh Circuit, sitting by designation.

PER CURIAM: This is an appeal by plaintiff, Betty A. Rosen, from an unpublished opinion and order by the Honorable John W. Potter of the United States District Court for the Northern District of Ohio. Judge Potter granted a motion for summary judgment in behalf of the defendants, Chrysler Plastic Products Corporation and the United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) Local 1879. For the reasons set forth below, we affirm the decision of the district court.

The plaintiff filed a complaint pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et. seq., alleging that the defendants discriminated against her on the basis of sex. Specifically, plaintiff claimed that Chrysler paid a higher wage to a male employee, although both employees

performed substantially equal work in the same department. The trial court disagreed and ruled that the plaintiff and her male counterpart were performing different duties at least until 1974 or 1975 and thus the initial wage differential was due to a factor other than sex. Rosen v. Chrysler Plastic Products Corp., No. C79-93, slip op. at 8, 9 (N.D. Ohio Mar. 28, 1983).

The plaintiff also challenged an aspect of the first collective bargaining agreement between Chrysler and the Union which "red-circled"[1] the salaries paid to thirteen individuals, including the plaintiff's male counterpart. During the

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[1]The term "red-circle rates" is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. See generally Rosen v. Chrysler Plastic Products Corp., No. C79-93, slip op. at 6-8 (N.D. Ohio Mar. 28, 1983) (discussing red-circling in various context).

negotiation of this initial union contract, in 1974, it was discovered that these thirteen employees held classifications and accompanying pay grades which did not reflect their actual job duties. Chrysler and the Union agreed to "red-circle" these employees and pay them at their former higher salary for as long as they remained on the job. It was also agreed, however, that once these thirteen employees left the job, their replacements would be assigned the appropriate classification and salary grade. The trial court ruled that the "red-circle" provision in this case was a valid sex-neutral resolution to the pay disparity which Chrysler and the Union faced when they negotiated the collective bargaining agreement. Id. at 9. Based upon these findings, the trial court concluded that at all relevant times the difference in

wages paid the plaintiff and her male counterpart was due to factors other than sex and accordingly granted the defendants' motions for summary judgment. Id. at 10.

Given the thorough and thoughtful opinion prepared by Judge Potter, we adopt the findings and conclusions of that opinion. Accordingly, we affirm the judgment of the Honorable John W. Potter of the United States District Court for the Northern District of Ohio.

CERTIFICATION

This is to certify that three copies of the foregoing Petition for a Writ of Certiorari was served upon each of the respondents in the foregoing cause, by sending same by ordinary mail, with postage prepaid, on this 5th day of November, 1984, addressed as follows:

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